

**HB 565: Fault-Based Comparative Negligence
Principles Apply Under the Montana Safety Act**

Prepared by the Montana Contractors Association

1. The Montana Scaffolding Act was amended in 1995 to confirm that comparative negligence applies in cases under that law. In a Scaffolding Act action, each party's fault is considered. The Montana Safety Act, which imposes safe workplace standards, does not have a similar provision.

2. Seven recent Montana District Court decisions have considered whether comparative negligence applies in Safety Act cases. Two of these cases have stayed with traditional fault-based standards; the other five have imposed what amounts to be a strict liability standard on defendant contractors and subcontractors. In these strict liability courts, defendants have lost their right to prove that a worker's own negligence contributed to his or her injuries. The defense then becomes much more difficult and far more expensive.

3. HB 565 clarifies that the "comparative negligence principles provided in Title 27, chapter 1, part 7" apply to any claims against an owner, contractor, subcontractor or builder who is 'subject' to the requirements of the Montana Safety Act.

4. In workplace tort cases, a subcontractor and its employee (the plaintiff) are often the principally negligent parties. The injured employee gets work comp benefits on a no fault basis, while the immediate employer is protected from tort liability by the shield of workers' compensation exclusivity. But the injured employee can try to supplement the work comp award by suing the owner, the general contractor, or an upper tier or lateral subcontractor for tort recovery.

5. HB 565 clarifies that comparative negligence applies in these workplace torts just as it does under the Scaffolding Act. Ironically, unless these principles are followed, work being placed with subcontractors could be minimized as general contractors and upper tier subcontractors bring work back in-house to ensure greater control over workplace conditions.

6. Now, if an injured worker has a claim under the Scaffolding Act, he or she has every incentive to abandon that claim and instead assert a claim under the Safety Act. Comparative negligence should be consistently available, and liability should be assessed based on each party's fault. HB 565 only confirms what most lawyers believe to be the law today.

DISTRICT COURT CASES STRIKING COMPARATIVE NEGLIGENCE

1. Matlen v. Engineered Structures, Inc., DV-03-351, Montana Eleventh Judicial District, Flathead County, Judge Katherine Curtis, presiding. Engineered Structures, Inc. (ESI) was the general contractor on the Kalispell Home Depot. Plaintiff Matlen was the foreman for subcontractor Weld-Tech, Inc. During construction, Matlen fell through openings in the metal decking of the building's roof. Judge Curtis issued an order in August 2005 holding that ESI had a non-delegable duty to provide a safe workplace under the Montana Safety Act. Furthermore, the Court relied on old scaffolding act cases (pre-dating the 1995 amendment allowing for the defense of comparative negligence) in determining that any negligence on Matlen's part was inadmissible at trial. The Court noted that ESI could still argue that its alleged negligence did not cause Matlen's injury, but precluded ESI from pointing to any negligence on the part of Weld-Tech or Matlen that may have contributed to or caused Matlen's injuries. Realistically, ESI became absolutely liable for Matlen's injury following the Court's ruling as ESI could not rely on Matlen's own negligence as a defense.
2. McGillivray v. Jurassic Resources Development North America, DV-02-690, Montana Thirteenth Judicial District Court, Yellowstone County, Judge Susan Watters presiding. Jurassic Resources contracted with Shell Oil Company to drill for oil on Shell's property in Wibaux County. Plaintiff McGillivray and his employer, Faith Drilling Company, contracted with Jurassic Resources to complete the actual drilling. During the drilling, McGillivray was injured while working on the mast of the drilling rig approximately sixty feet off of the ground when the rig blew over, most likely due to high winds. Judge Watters issued an order in January 2004 holding that drilling oil is an inherently dangerous activity as a matter of law which imposed a non-delegable duty of safety upon Jurassic. Once again the Court relied on old scaffolding act cases in determining that the defense of comparative negligence was not available Jurassic. Realistically, Jurassic became absolutely liable for McGillivray's injury following the Court's ruling as Jurassic could not rely on McGillivray's own negligence as a defense.
3. Wild v. Ridgeline Builders, Inc., DV-01-342, Montana Eighteenth Judicial District Court, Gallatin County, Judge Holly Brown presiding. Defendant Ridgeline Builders, Inc., was a general contractor on a building project. Ridgeline subcontracted the roofing work to Fregein Roofing, which employed the plaintiff Kelly Wild. During construction, Wild was injured when he fell from the roof. Initially, Wild asserted claims based on both the Montana Safety Act and the Montana Scaffolding Act. Subsequent to filing the lawsuit, Wild withdrew his claim based on the scaffolding act. Based on Ridgeline's contract with the project owner, Judge Brown issued an order in February 2006 holding that Ridgeline owed a non-delegable duty of safety to Fregein's employees, including Wild. Once again the Court relied on old scaffolding act cases in determining that the defense of comparative negligence was not available to Ridgeline. Realistically, Ridgeline became absolutely liable for Wild's injury following the Court's ruling as Ridgeline could not rely on Wild's own negligence as a defense.

4. Shott v. D.H. Blattner & Sons, Inc., DV-00-217, Montana Fourth Judicial District Court, Missoula County, Judge Robert Deshamps, III, presiding. Defendant D.H. Blattner & Sons, Inc., was the general contractor on a Clark Fork bridge project near Paradise, Montana. The plaintiff, an iron worker employed by a subcontractor on the project, suffered injuries when he fell approximately 19 feet during construction. Judge Deshamps determined that Blattner had breached its non-delegable duty to ensure the safety of its subcontractors' employees based on the inherently dangerous nature of the construction project and the contract between the owner and Blattner. Judge Deshamps initially determined that a general contractor should be free to assert a defense that the plaintiff, a subcontractor's employee, was comparatively negligent in an order dated September 29, 2006. However, the Court clarified in a subsequent ruling dated November 2, 2006, that Blattner could not rely on a comparative negligence defense. Judge Deshamps held, "Until the Montana Supreme Court issues a clear ruling, or the Montana Legislature expressly addresses the comparative negligence defense as it applies to a contractor's breach of its nondelegable duty and/or the Montana Safety Act, the district courts will interpret the existing law and rule accordingly based on the facts before them . . . The Court has scrutinized the facts and legal authority in the case at hand and rejects Blattner's attempt to apportion liability to [the plaintiff] on a comparative negligence theory." Realistically, Blattner became absolutely liable for the plaintiff's injury following the Court's ruling as Blattner could not rely on the plaintiff's own negligence as a defense.

Also worth noting is Judge Salvagni's decision in Hawkes v. McDonald Construction, Inc., where the Court awarded judgment on liability and causation to the plaintiff, limiting the trial to a determination of damages only. In that case, the plaintiff was employed by a subcontractor doing work for the general contractor, McDonald Construction. The plaintiff utilized 44-inch stilts to install a drop-down ceiling in a commercial building. During installation, the plaintiff fell after stumbling on an open vent hole in the subfloor resulting in broken ribs and back injuries. The Court ruled that McDonald had a non-delegable duty of safety based on the control of the workplace granted to McDonald by the general contract. Based on this non-delegable duty of safety, the Montana Safety Act, and the similar rulings by Judges Curtis and Brown, Judge Salvagni eliminated the defense of the worker's comparative negligence and held McDonald liable as a matter of law. The only issue left for the jury to decide was the amount of the plaintiff's damages. (Case to be provided).

DISTRICT COURT CASES UPHOLDING COMPARATIVE NEGLIGENCE

5. Olson v. Shumaker Trucking and Excavating Contractors, Inc., DV-05-1002, Montana Eighth Judicial District, Judge Dirk Sandefur presiding. Defendant Shumaker was the general contractor for the construction of a railroad spur line in Great Falls. Shumaker subcontracted a portion of the construction to Balfour Beatty which employed the plaintiff. After work on the date of the injury, several Balfour employees and supervisors utilized a front-end loader to take them from the worksite to the parking area, a distance of approximately three miles. Plaintiff and three other Balfour employees rode in the bucket of the loader while three other Balfour employees rode in the cab. During

the ride to the parking area, a Balfour employee riding in the cab inadvertently made contact with a lever controlling the bucket, thereby causing the bucket to drop on and crush plaintiff's leg, causing serious injury.

The contract between Shumaker and the owner required Shumaker to provide a safe workplace. Shumaker's safety plan expressly forbid workers from riding on construction equipment. However, the Court determined that Shumaker breached its non-delegable contractual duty to provide all workers on site with a safe workplace. The plaintiff sought a ruling from the Court precluding Shumaker from relying on the plaintiff's own negligence as a defense. The Court issued an exhaustive ruling in October 2006 refuting the plaintiff's attempt to shield himself from his own negligence in causing his injury. The Court's order specifically addressed and rejected the old scaffolding act cases as non-dispositive of the issue noting, "At common law and under Montana's statutory comparative negligence scheme, every person has a legal duty to act in a manner that is reasonable and prudent under the circumstances for the person's own protection from harm . . . Thus, if, as in this case, the contractor's negligence, whether ordinary negligence or negligence per se, has subjected a worker to an unreasonable danger or risk, then application of comparative negligence would simply require the jury to determine whether the worker acted in a reasonable and prudent manner *in the context of the dangerous environment created by the contractor.*" The Court continued, "Here, irrespective of implication of the Montana Safety Act as the standard for negligence per se, the claim at issue in this case is nothing more than a common law negligence claim based upon the contractor's violation of a nondelegable contract duty. Thus, in essence, this case is simply a negligence per se case based upon a violation of the Montana Safety Act arising from a violation of a nondelegable contract duty. Consequently, for the foregoing reasons, the Court concludes that the Montana Safety Act does not relieve a subcontract employee of his default legal duty to act in a manner that is reasonable and prudent under the circumstances for his own protection from harm." Judge Sandefur correctly interpreted the law to allow the general contractor to rely on the plaintiff's own negligence as a defense.

6. Stenson v. Quality Construction Company, DV-03-862, Montana Fourth Judicial District Court, Missoula County, Judge John Henson presiding. Quality Construction was the general contractor on a building project. Plaintiff Stenson was employed by the ironwork subcontractor. During construction, Stenson was injured during a fall from a raised scissor lift. Stenson requested that the Court rule that any negligence on his part is inadmissible at trial based on the Montana Safety Act. The Court issued a ruling in March 2006 holding, "[G]iven the amendment to the Scaffolding Act, it is indisputable that comparative negligence was made an available defense . . . The parties concur that the Scaffolding Act does not apply, as the scissor lift is statutory excepted from the definition of Scaffolding. Clearly, comparative negligence must be allowed, as it would have been even had the scissor lift not been subject to statutory exception and the contractor subject to certain nondelegable duties." Judge Henson correctly interpreted the law to allow the general contractor to rely on the plaintiff's own negligence as a defense.